STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2008
v	No. 273645 Saginaw Circuit Court
HAROLD WINFIELD CAGE, Defendant-Appellant.	LC No. 05-026553-FH

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of breaking and entering a barn with the intent to commit a felony therein, MCL 750.110, possession of burglar's tools (bolt cutters), MCL 750.116, and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 6 to 20 years for each count. Pursuant to an amended judgment of sentence, the prison term for the resisting and obstructing conviction was changed to 6 to 15 years' imprisonment. We affirm.

Defendant was seen trespassing inside a pole barn by neighbors of the pole barn's owner. After chasing defendant off the property, the neighbors locked up the barn and left to report the incident to the owner. When the neighbors and the barn owner returned soon thereafter, they found that a lock had been cut off one of the barn doors and that there were items missing from inside the barn. Defendant was spotted in a field behind the barn and took off running after one of the neighbors yelled. Bolt cutters were found where defendant had been standing, as well as items taken from the barn. After the police arrived, defendant was again spotted in the area. The police ran after defendant and apprehended him. Defendant was taken to the hospital when, after he was arrested, he complained of dizziness. Defendant then left the hospital after he was treated. Defendant was arrested again about five days later.

Defendant claims that the prosecutor engaged in misconduct by introducing defendant's parole status into evidence when it was inadmissible and had already been ruled inadmissible by the trial court. Claims of prosecutorial misconduct are reviewed on a case-by-case basis through examination of the record and evaluation of the challenged remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

The prosecutor initially sought to introduce testimony from the owner of the pole barn that defendant had told him that he did not want any trouble because he was on parole. The court ruled that the witness could testify about defendant not wanting any trouble, but he could not mention the reference to defendant's parole status. Subsequently, the prosecutor sought permission to impeach defendant under MRE 609 with three prior larceny convictions after defendant took the stand. The court denied the request, but noted that the prosecutor could ask defendant about what he said to the barn owner and whether he told the barn owner that he was on parole. However, the prosecutor simply asked defendant on cross-examination if he was on parole, contrary to the manner in which the parole issue could be raised as directed by the court. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). We find it unnecessary to resolve whether the prosecutor acted in bad faith and committed misconduct, as opposed to simply misconstruing the court's direction, nor is it necessary to determine whether the evidence was improper under MRE 404(b). Reversal is not required given that any assumed error was cured with an appropriate jury instruction that the jurors were to disregard defendant's parole status. Given that juries are presumed to follow their instructions, *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994), this instruction alleviated any prejudicial impact, *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003). Moreover, considering the curative instruction in conjunction with the overwhelming evidence of defendant's guilt, any error was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant also argues that he was denied his right to due process by the trial court's failure to find that he was incompetent to stand trial, or at the very least, to grant defendant an independent expert to evaluate his competency. We disagree. A trial court's determination of a defendant's competency is reviewed on appeal for an abuse of discretion. *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990); *People v Ritsema*, 105 Mich App 602, 606; 307 NW2d 380 (1981).

"A defendant to a criminal charge shall be presumed competent to stand trial." MCL 330.2020(1); see also *People v Abraham*, 256 Mich App 265, 283; 662 NW2d 836 (2003). A defendant

> shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial. [MCL 330.2020(1).]

Defendant claims that he was improperly found competent to stand trial because he was unable to assist in his own defense in a rational manner, evidenced by his inability to get along with three different court-appointed defense attorneys. The court allowed the first two attorneys to withdraw from the case, but it denied defendant's third attorney's request to withdraw. The court then granted counsel's request for a competency hearing.

The report prepared by the person assigned to assess defendant's mental competency indicates that defendant's inability to work with the court-appointed attorneys was reflective of

"maladaptive personality characteristics," not that it was symptomatic of a general inability to rationally assist in his own defense. Indeed, the report indicates that defendant

> has demonstrated in several ways the ability to assist rationally in his own defense, should he choose to do so. He was able to provide his own account of the allegations against him, could respond to questions about the account he provided, and respond to questions about the police report. . . . He appeared able to attend to testimony, weigh options, and make reasoned decisions. . . . The defendant was appropriately motivated to obtain the best outcome of his case that he could. He was not suffering from any mental conditions that might be expected to interfere with his ability to understand the nature an object of the proceedings against him or assist rationally in his defense, should he be motivated to do so.

Defendant argues that the expert's conclusions were incorrect and that the evidence of defendant's inability to get along with his attorneys combined with an apparent head injury (testified to by defendant but never corroborated beyond the fact that defendant had a bump on his head) was enough to indicate that further analysis by an independent expert was warranted. In essence, defendant's argument seems to be that because there is evidence of defendant's possible incompetence, an independent expert to determine competence is mandated.

All of the authority cited by defendant only pertains to the general requirement that a defendant must be competent to stand trial and the requirements for having a hearing. Defendant cites no authority to support his claim that, in addition to a competency hearing and evaluation, he was entitled to an independent expert to evaluate his competence. Defendant cannot simply announce a position or assert an error and "leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We note that MCR 6.125(D) provides that "[o]n a showing of good cause by either party, the court may order an independent examination of the defendant relating to the issue of competence to stand trial." Even had defendant properly presented this argument, the record does not establish good cause to order an independent competency examination. In any event, based on the expert evaluation performed, it cannot be said that the trial court's conclusion that defendant had not overcome the presumption that he was competent to stand trial was outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

We also reject defendant's claim that he is entitled to resentencing because the trial court failed to calculate his guidelines score for all three convictions as opposed to scoring only the highest-class offense. Contrary to defendant's argument, the statutory scheme only requires that the highest crime class felony conviction be scored, which was done in this case. MCL 777.21(2); MCL 771.14(2)(e); *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342 (2005).

We agree that the court erred in initially imposing a maximum sentence for resisting and obstructing a police officer that exceeded the statutory maximum. MCL 750.81d(1) sets the statutory maximum sentence at two years. MCL 769.12(1)(b) provides that a fourth-offense habitual offender's maximum allowable sentence is 15 years for any offense that is otherwise

punishable by less than 5 years, such as the crime here. Again, defendant was initially sentenced to 6 to 20 years' imprisonment on this conviction. However, because an amended judgment of sentence was subsequently entered that amended the sentence to 6 to 15 years' imprisonment, the issue has become moot and no further action is necessary.

Defendant also argues that he was denied the effective assistance of counsel because his attorney did not put on alibi witnesses who would have shown that defendant was not at the scene of the crime and because trial counsel did not give defendant adequate time to examine the presentence investigation report (PSIR). We disagree.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to the argument concerning alibi witnesses, defendant fails to indicate who would have acted as an alibi witness on his behalf, nor does he describe the nature of any proposed alibi testimony. The argument is overly vague. Accordingly, the argument fails.[1] As for the claim that he was not given his PSIR in a timely fashion, we note that defendant did get the opportunity to challenge the PSIR at sentencing. Moreover, defendant does not identify any errors in the PSIR. Accordingly, the argument fails.

Defendant further alleges a conspiracy against him between his trial counsel, his former trial counsel, and the prosecutor. But there is no evidence in the existing record to support this charge. See *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defendant also

[1] To the extent that defendant suggests that counsel failed to properly investigate and prepare a defense other than the claimed alibi defense, defendant's failure to identify any other defense or to provide specifics demands that we reject the argument.

maintains that the prosecutor suppressed a 911 tape, DNA evidence, and fingerprint evidence that was favorable to defendant in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, there is simply no record support for this argument, nor is the argument sufficiently developed.

Defendant next claims that he was denied his constitutionally protected right to represent himself at trial. We disagree. Defendant never properly requested to represent himself at trial. See *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004). Defendant did make a somewhat equivocal request to represent himself in one of dozens of letters to the trial court, but this was only after the trial court had already responded to an earlier correspondence, telling defendant that he had "already been advised on a number of occasions that it is improper for a party to unilaterally contact the court," and advising him that he had to "contact [his] attorney so that these issues may properly be brought before the court." Further, defendant had ample opportunity while before the court to request self-representation, but he never did so.[2] Therefore, because there was no proper, unequivocal request by defendant to represent himself, the trial court did not deny defendant his right to self-representation. *Russell, supra* at 190.

Finally, to the extent that an issue has not been addressed above, we have thoroughly reviewed defendant's supplemental Standard 4 brief and find no basis for reversal on the matters raised therein, nor do valid grounds exist to remand for a *Ginther*[3] hearing.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio

[2] The record reveals that defendant has little difficulty expressing himself when so inclined.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).